WP(C) 6434/2006
BEFORE
HON'BLE JUSTICE B.K. SHARMA

JUDGEMENT AND ORDER

1. The challenge in this writ petition is the decision of the official respondents towards qualifying the respondent No. 5 in technical bid and opening of the price bid and pursuant thereto the negotiation held with the respondent No. 5 in respect of the tender enquiry.

2. The petitioner is an existing contractor under the respondent Corporation in respect of transportation of food grains etc. In response to the notice inviting tender (NIT) dated 04.10.06 in two bid tendering system (technical bid and price bid) from the intending tenderers for transportation of food grains from Ex-Rly siding/station, Gossaigaon to FCI FSD, Gossaigaon for two years on regular basis for the estimated value of contract Rs. 1,04,86,000/- (approximate), the petitioner responded to the same by submitting his tender. As per the NIT stipulation, price bid of only those tenderers who qualified in the technical bid was to be opened. By a corrigendum dated 26.10.06, the eligibility criteria stipulated in NIT was modified as below:

Experienced and bonafide Handling/Transport Contractors with strong financial background having experience of Handling/Transportation with Manufacturing/Handling Agency/Government/ PSU/ Public Limited Company dealing in fertilizer/ food grains/ cement or similar products during preceding 2 years of transport contracts, the total valued of which is not less than 50% of the estimated value of as stated below, OR, the tenderer should have executed in the immediately preceding two years any single contract, the value of which is not less than 25% of the estimated value &.

3. As per clause-7 (g) of the model tender form, the price bid of only those tenderers shall be opened whose technical bids are found acceptable and the time and date of opening of price bids shall be fixed and intimated to them. As per Appendix-II model tender form for fulfillment of the criteria regarding works experience, the tenderers are to submit experience certificate dully obtained from the manufacturing/ handling agencies/ Govt./PSU/ Public Limited Company dealing in fertilizer/ food grains/ cement or similar products during preceding 2 years of transport contracts.

4. In the meantime, the term of the earlier contract expired on 21.11.06 and no settlement having been made for ensuing period before the expiry of the said term, the respondent Corporation by its letter dated 10.11.06 asked the petitioner to continue with the transportation work for another three months on temporary basis or till placement of the regular contractor, whichever is earlier. According to the petitioner he having continuously executed similar contract works since last several years and having transported food grains items for the value of Rs. 50,40,900/- (approximately) for the year 2004-06, same was more than 25% to the estimated value of contract.

5. Pursuant to the submission of tenders by the tenderers including the respondent No. 5 and the petitioner, same were opened on 14.11.06. However, no scrutiny of the documents could be done upon opening of the technical bid in view of the involvement of volumes of tender papers. As such for scrutiny of the tender papers, a committee was constituted. According to the petitioner, no notice fixing the date and time for scrutiny of the tender papers was served on the petitioner and the committee scrutinized the tender papers on 21.11.05 and found both the petitioner and the respondent No. 5 qualified and accordingly recommended to open the price bids to the successful tenderers in technical bid. Both the

petitioner and the respondent No. 5 were informed by communication dated 27.11.06 that they have qualified in the technical bids and that the price bid shall be opened on 28.11.06. Upon opening the price bids, it was found that the rate quoted by the petitioner was Rs. 53 per MT for the entire distance and that of the respondent No 5 was Rs. 44 per MT. However, the authority was of the opinion that the rate quoted by both the petitioner and the respondent No. 5 were on the higher side and accordingly the decision was taken to negotiate with the participating tenderers as regards the rate quoted by them.

6. It is the case of the petitioner that he was expecting invitation for negotiation from the respondent Corporation. However, inspite of lapse of considerable period of time when he did not receive any such invitation, he visited the Guwahati Office of the Corporation to enquire the fate of his tender. Upon such enquiry he could come to know that FCI authorities have already issued intimation to the respondent No. 5 only directing him to appear for negotiation and pursuant to such intimation, the respondent No. 5 had also appeared before the FCI authorities on 06.12.06 and upon negotiation, the original rate offered by him, i.e. Rs. 44 per MT, has been reduced to Rs. 43 per MT. Thus, according to the petitioner, there has been violation of equality clause of giving equal opportunity to the petitioner by not calling him for negotiation.

7. In paragraph-14 of the writ petition, the petitioner has stated that the respondent Corporation has committed illegality in accommodating the respondent No. 5 inasmuch as the said respondent having not fulfilled the eligibility criteria of the NIT, he could not have been held to be qualified in the technical bid and consequently his price bid could not have been opened. According to the petitioner the respondent No. 5 has not fulfilled the requirement regarding 25% work experience during the immediately preceding two years. It has been stated that the respondent No. 5 submitted a certificate dated 14.07.04 only concerning the works executed by him during the period from 16.05.02 to 15.05.04 and thus the said certificate does not pertain to the period immediately proceeding two years from the date of submission of tender. According to the petitioner, the term immediately preceding 2 years would mean the period from 15.11.04 to 14.11.06. Thus, according to Appendix-II of the NIT, the respondent No. 5 having failed to submit the experience certificate of immediate preceding two years, his technical bid ought to have been rejected. But the authority not only held him to have qualified in the technical bid, but also invited for negotiation after opening the price bid.

8. The petitioner has stated that the respondent No. 4 with a malafide intention issued the letter dated 16.11.06 to the Area Manager, Kokrajhar asking him to give details of the work value executed by the petitioner and the respondent No. 5 during the period from 13.11.04 to 14.11.06. The Area Manager on receipt of the said letter intimated by his letter dated 18.11.06 that during the period in question, the work value of the respondent No. 5 was Rs. 18,23,674/- and that of the petitioner was Rs. 92,90,188/-. It was also intimated that the respondent No. 5 executed work on ad hoc basis upto 1812.04 and thereafter he had not been appointed as transport contractor. Thus it is the case of the petitioner that as per the said letter dated 18.11.06, the respondent No. 5 did not have the requisite work experience during the period immediately preceding two years of the present contract. Taking into account the estimated value of the contract which is Rs. 1,04,86,000/-, 25% of the same will be at Rs. 26,21,500/- and thus it has been contended by the petitioner that from the said letter dated 18.11.06 it is crystal clear that the respondent No. 5 did not have work experience worth of 25% of the value of the contract.

9. Certain allegations have been made against the respondent No. 5 in respect of his existing contract with the respondent Corporation which according to the petitioner had been continued with the respondent No. 5 on ad hoc basis for the period from 19.06.04 to 18.12.04. According to the petitioner, the respondent

No. 5, during the period committed serious anomalies and irregularities by not placing the trucks in time. Consequently, the FCI authority was compelled to pay demurrage charge to the railway administration. According to the petitioner the vigilance cell of the FCI has seized the documents pertaining to the ad hoc contract with the respondent No. 5.

10. From the tenor of the averments made in the writ petition, what could be gathered is that it is the case of the petitioner that since the respondent No. 5 did not fulfill the requirement of executing works worth Rs. 25% of the value of the contract and no certificate having been annexed, the authorities of the FCI could not have accepted the technical bid offered by the respondent No. 5 and as such all follow up action taken by the authorities with the respondent No. 5 are wholly unwarranted and liable to be interfered with.

11. The respondents, both official as well as private have responded to the writ petition by filing their affidavits in opposition. It has been contended in the affidavits that the bids were asked from the experienced and bonafide handling/transport contractors and since the respondent No. 5 is an experienced and bonafide handling/ transport contractor of the respondent Corporation, his credentials were taken into account and when it was found that he had fulfilled the requisite essentials for execution of the works worth of Rs. 25% of the contract value, his technical bid was executed. As regards the challenge to the negotiation, it has been stated that as per the norms laid down, such negotiation can only be made with the lowest bidder and cannot be made with all. Since the bid offered by the respondent No. 5 was the lowest, he alone was invited for negotiation.

12. Referring to another item of work in the same NIT dated 04.10.06 estimated value of which is Rs. 5,95,07,000/-, it has been stated by the respondents in their affidavit that the respondent No. 5 who had offered his bid for the said work also was not found qualified in technical bid. By making a reference to the said work, it has been contended that had it been intention of the respondent Corporation to favour the respondent No. 5, he would have been considered for the said work also.

13. The respondents have denied the allegations made regarding opening of the technical and price bids. They have also indicated the details of the work done by the respondent No 5 with the FCI for single contract from June, 2004 to December, 2004 which is of Rs. 1,48,73,962/- Thus, according to the respondents, the respondent No. 5 has fulfilled the requirement of having executed the work worth 25% of the value of the contract. In paragraph-6 of the affidavit, the official respondents have stated that the date of the NIT being 04.10.06, the preceding two years would be for the period 05.10.04 to 04.10.06. It has been stated that the respondent No. 5, an existing contractor of the FCI, submitted certificate from the District Manager on 14.07.04 showing execution of the works between the period from 16.05.02 to 15.05.04 which covers the period of two years, but not immediately proceeding two years.

14. According to the respondents, they have perused the relevant records of experience of the respondent No. 5, he being an existing contractor. The letter dated 16.11.06 which has been referred to by the petitioner, has also been mentioned by the respondents in their affidavit. It has been contended that same did not exactly relate to the period for the purpose of assessing the fulfillment or otherwise of the technical criteria of the respondent No. 5. It has been stated that the authority looked into the relevant records and after due scrutiny it found that the respondent No. 5 has performed transportation work with the FCI under ah hoc contract for the period from June, 2004 to December, 2004 which covers the relevant period and his experience from November, 2004 to December, 2004 alone is to the extent of Rs. 34,50,805/- in a single contract is by far above the requirement of Rs. 26,21,500/- in a single contract for the preceding tw

o years. In paragraph-11 of the affidavit, the official respondents have stated that having regard to the fact that the respondent No. 5 in reality qualified fo r the technical bid having had the requisite work experience, his bid could not have rejected keeping in mind the public interest involved. According to the re spondents, the entire decision making process is fair, transparent and non-arbit rary.

15. The respondent No. 5 in his affidavit has reiterated the stand of the of ficial respondents. It has been stated by the respondent No. 5 in his affidavit that at the relevant column of the tender documents he has clearly indicated hi s experience by mentioning about the value of the two existing transportation wo rks under FCI, i.e. (i) for the period from 19.06.04 to 18.12.04 for a value of Rs. 1,48,73,962/- and (ii) for the period from 16.05.02 to 15.05.04 the value of which is Rs. 2.39 corers. According to him he has required experience to qualif y the technical bid. He had submitted an application on 10.08.06 before the Dist rict Manager, FCI, District Office, Kokrajhar praying for issuance of the perfor mance certificate for the period from 19.06.04 to 18.12.04, but he was intimated that due to demurrage charge liability, some amount was withdrawn from the bill and the matter was to be forwarded to the Regional Office at Guwahati for final decision towards demurrage charge liability. Thus, the office was not in a posi tion to issue the performance certificate until the matter was finalized by the Regional Office. Situated thus, the respondent No. 5 was unable to enclose the e xperience certificate for the single transportation contract work worth Rs. 1,4 8,73,962/- covering the relevant period. According to him, the value of the con tract work only for two months, i.e. November, 2004 and December, 2004, i.e. im mediately preceding two years, as per the NIT and corrigendum of the single tra nsportation contract work, is for a value of Rs. 1,48,73,962/-. It has further been stated that value of the work for the period from 19.06.04 to 18.12.04 is R s. 34,50,805/- which is more than the requirement of Rs. 26,21,500/-, i.e. 25% o f the estimated value of the contract.

16. As regards the allegations that the respondent No. 5 had experience in r espect of only ad hoc contract, it has been contended by the respondent No. 5 that in the NIT there was no mention that the tenderers will have to have experi ence of executing regular single contract.

17. From the tenor of the stand of the official as well as the private respo ndent what could be gathered is that irrespective of the non-enclosure of the ex perience certificate, since the respondent No. 5 in fact, has executed the trans portation works worth more than 25% of the estimated value of the contract, and since the petitioner has executed the said work under FCI, there is no wrong in considering the technical bid of the respondent No. 5.

18. The petitioner has filed an affidavit in reply to the affidavit filed by the official as well private respondent to which the petitioner has also submit ted the rejoinder affidavit in reply.

19. Amidst the aforesaid pleadings and counter pleadings etc., Mr. K.N. Cho udhury, learned Sr. counsel assisted by Mr. R. Dubey, learned counsel for the pe titioner has primarily argued that the respondent No. 5 having failed to furnish the requisite experience certificate, his technical bid ought to have been reje cted. To buttress his argument, Mr. Choudhury, has placed reliance on the decis ions of the Apex Court reiterated in (1979) 3 SCC 489 (Ramana Dayaram Shetty vs. International Airport Authority of Indian and others) and (2001) 2 SCC 451 (W est Bengal State Electricity Board vs. Patel Engineering Company Ltd.). He has a rgued that the respondents cannot develop their case through affidavit in opposi tion and the matter will have to be decided as it stood at the time of filing of the tenders.

20. Mr. P.K. Roy, learned counsel representing the FCI, on the other hand su

bmitted that the requirement was not the certificate but the experience worth 25 % to the estimated value of the contract. He has placed reliance on the decision of this Court reported in 2000 (3) GLR 173 (Bibhu Bhushan Choudhury vs. Union of India and others) Mr. K.H. Choudhury, learned Sr. counsel assisted by Mr. S.K. Muktar, learned counsel representing the respondent No. 5 submitted that there was no wrong in the decision making process of the official respondents and it is an admitted position that the respondent No. 5 has required experience and that too with the FCI itself and thus the FCI was within its domain and competence to take into account the said experience towards consideration of the case respondent No. 5.

21. During the course of hearing, the only argument advanced is relating to conclusion of non-submission of the work experience certificate. In this connection, learned counsel for the petitioner has referred to tender documents containing the clause that the tenderer should have executed a single contract immediately proceeding two years, the value of which is not less than 25% of the estimated value of the contract. Referring to Annexure-E tender documents as per which the tenderer is required to enclose experience certificate, it has been contended by the learned counsel for the petitioner that irrespective of the fact as to whether the respondent No. 5 in fact, has the requisite experience, in absence of such certificate enclosed to the tender documents, the respondents could not have considered his tender and the same ought to have rejected.

22. The petitioner himself has admitted in the writ petition in paragraph 15 that the respondent No. 5 has executed transportation work total value of Rs. 1,48,73,952/- on ad hoc basis during the period from 19.06.04 to 18.12.04. In the counter affidavit filed by the respondents, it has been pointed out that in the aforesaid period the respondent No. 5 has executed works worth Rs. 34,50,805/- in a single contract from November, 2004 to December, 2004, which is within the period 05.10.04 to 04.10.06. Thus, the amount of Rs. 34,50,805/- far exceeds the requirement of Rs. 26,21,500/-. This specific plea of the respondents has not been denied by the petitioner. His only contention is that since the respondent No. 5 failed to annex the work experience certificate, the tender submitted by the respondent No. 5 was defective and ought to have been rejected.

23. The case of Ramana Dayaram Shetty (supra) has been referred to primarily to contend that the standard and eligibility laid down in the tender notice can not be departed from arbitrarily and that such departure from the standard would amount to denial of equality of opportunity to those who felt bound by the standard of eligibility and therefore did not submit their tenders. Same is not the case in hand. It is not a case of making any departures from the standard of eligibility. It is also not the case of accepting the tender of the respondent No. 5 upon deviation being made from the standard of eligibility to the deprivation of other tenderers. There is no dispute, rather has been admitted by the petitioner that the respondent No. 5 has the requisite experience, but he failed to annex the experience certificate along with his tender papers. The question is not of a certificate, but is the required experience. When it is an admitted position that the respondent No. 5 has the requisite experience by way of executing contract under the same very authority, I am of the considered opinion that merely because the respondent No. 5 could not submit the experience certificate along with the tender documents as the same was not issued to him by the competent authority of the FCI, it will not be fatal.

24. In the case of Patel Engineering (supra), it has been held by the Apex Court that strict adherence of instruction to bidders is essential and inclusion of mistake in bid documents cannot be permitted to be corrected on the basis of equality. The present case is not a case of making correction to bid documents. The respondent No. 5 clearly indicated in his bid documents that he has requisite experience but for the reason that the certificate was not issued by the same authority which has issued the NIT in question, same could not be annexed with t

he tender documents. The tender issuing authority upon receipt of the tenders go t the work experience verified through its own documents and found that in fact, the respondent No. 5 has the requisite experience. This aspect of the matter ha s been admitted by the petitioner, but only plea raised by him is that the respo ndent No. 5 having not annexed the work experience certificate, his tender oug ht to have been rejected.

25. The decision on which the learned counsel for the respondent Corporation has placed reliance, i.e. Bibhu Bhusan Choudhury (supra), has emphasized that right to choose from one tenderer from others is vested with the authority and unless it is shown that the power has been exercised arbitrarily and for collate ral purpose, the writ Court will be reluctant to interfere with the decision of the authority. It was emphasized that the Court in its dispensation of justice is to keep in mind the public interest and the public benefit. In exercising the discretion, the Court is to make balance between the conflicting interest. In the instant case, what has emerged from the discussion made above is that the a uthority has exercised the discretion in a particular way which in my view can not be said to be arbitrary or discriminatory, more so, when the fact relating t o requisite work experience of the respondent No. 5 has been admitted by the pet itioner himself. The authority duly applied its mind and made its choice which c annot be said to be unreasonable. There is no question of violation of Article 1 4 of the Constitution of India. In R.V. Tower Hamlets London Borough Council, ex . P. Chentix Developments Ltd. reported in (1998) 1 All ER 961, the Court summa rized the principles in the following way:

& The court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they o ught not to have taken into account, or concersely, have refused to take into ac count or neglected to take into account matter which they ought to take into acc ount. Once that question is answered in favour of the local authority it may sti ll be possible to say that although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless com e to a conclusion so unreasonable that no reasonable authority could ever have c ome to it. In such a case again I think the court can interfere. The power of th e Court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned , and concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confined in them &

26. Mr. K.N. Choudhury, learned Sr. counsel for the petitioner has placed re liance on the following decisions also.

i) (1990) 2 SCC 486 (Ram Gajadhar Nishad vs. State of U.P. and others)
ii) (2005) 3 SCC 157 (Laksmi Sales Corporation vs. Bolangar Trading Company)

27. The aforesaid two decisions have been relied upon to buttress the argume nt that the conditions for valid tender cannot be diluted and it will be wrong t o hold that production of required documents is not mandatory. There is no quarr el with the proposition laid down by the Apex Court. Unlike the cases before th e Apex Court, in the instant case enclosure or non-enclosure of the work experie nce certificate will not make any change regarding qualification of the requisit e work experience of the respondent No. 5. In the tender submitted by him his w ork experience was clearly indicated. The respondent No. 5 being an existing co ntractor under FCI, it was within its knowledge that the respondent No. 5 has th e requisite experience and thus, submission or non-submission of the certificate would not make any difference. It is not the requirement of submission of the c ertificate from another authority other than the FCI. After all, what for the experience certificate is required. Same is required to satisfy the test of exec

ution of works worth 25% of the estimated value of the contract. It is the autho rity of the FCI which did not issue the certificate to the respondent No. 5 and the same very authority could not have rejected the tender submitted by the resp ondent No. 5 on ground of non availability of the certificate, more particularly when there was enough proof of conforming to the requirement of NIT, the res pondent No. 5 having executed work under the FCI. Written certificate cannot ove rride the unwritten certificate under custody of the respondent Corporation.

28. As has been held by the Apex Court in the case of Air India Ltd. Vs. Coc hin International Airport Ltd. and others reported in (2000) 2 SCC 617, even whe n some defects are found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercis e it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind i n order to decide whether its intervention is called for or not. Only when it co mes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

29. In the instant case, the plea taken by the petitioner is a technical ple a. The plea will have to be decided in the touchtone of any prejudice being caus ed to the petitioner and the principles underlying Article 14 of the Constitutio n of India. Even the petitioner has admitted that the respondent No. 5 has got t he requisite experience under the respondent Corporation. If the respondent No. 5 has fulfilled the requirement of the NIT, his deprivation on the technical ple a will lead to an absurd position in which although he fulfills the requirement of the NIT, but yet on the technical plea he will be denied participation in the tender process. It is precisely the reason as to why it has been observed by th e Apex Court that merely on making a point the writ Court will not interfere wi th the decision making process unless it is established to be vitiated by factor s like malafide, unreasonableness or arbitrariness. Over all public interest in volved demands that the case of the respondent No. 5 be considered. The rate off ered by him is also by far lower than the rate offered by the petitioner.

30. In the decision reported in AIR 2007 SC 437 (M/s B.S.N. Joshi vs. Nair C oal Services Ltd.) it has been held by the Apex Court that the declared defau lter should be actual defaulter and not alleged defaulter. In the instant case a lso, the petitioner is not lacking the requisite experience, but he is sought to be debarred on a technical plea raised by the petitioner. It is not even allege d that he does not have the requisite experience.

31. On the basis of the pleadings and arguments of both the parties what has emerged is that the respondent No. 5 has the requisite experience having execut ed the transportation works under the same very authority which has issued the N IT. Can it be said that the decision of the authority has founded on malafide an d colourable exercise of power. The respondent No. 5 in his tender documents cl early mentioned about his requisite experience which fulfills the requirement of the norms laid down in the NIT. It is true that the certificate in support of t he work experience was not annexed, but at the same time it will have to be cons idered as to why such certificate was required. Had it been a case of the respon dent No. 5 having executed transportation works with any other authority other t han the FCI, the authorities of the FCI would not have any occasion to verify th e fact relating to the work experience. Unlike such a situation, the petitioner being the existing contractor of the respondent Corporation which had issued the NIT, it was within its competence and jurisdiction to verify the veracity or ot herwise of the claim of the respondent No. 5 regarding fulfillment of the norms relating to works experience. Upon such verification when it was found that the respondent No. 5 in fact had the requisite experience which has also been admi tted by the petitioner himself in the writ petition, I am of the considered opin ion that there was nothing wrong for the authority in considering the tender sub mitted by the respondent No. 5.

32. To accept the plea of the petitioner will amount to acceptance of too technical a plea. The fact admitted by all cannot be brushed aside on the technical plea as has been projected by the petitioner. After all, it is the respondent Corporation who is to consider the tender submitted by the tenderers. It is an admitted position that the rate offered by the respondent No. 5 is the lowest and upon negotiation same has further been reduced. If the respondent No. 5 has otherwise qualified having conformed to the requirement of the NIT, the plea raised by the petitioner cannot be accepted. It is not a case of exercising the power of the authority for any collateral purpose. The real opinion formed by the authority of the FCI is on the basis of the actual state of affairs and not on the basis of any conjectures and surmises. The respondent Corporation is the best judge in the matter as the respondent No. 5 is an existing contractor under it. The respondent Corporation cannot be said to have infringed any right of the petitioner.

33. In view of the above, I am of the considered opinion that no interference is called for in the decision making process of the respondents and consequently the writ petition must fail.

34. The writ petition is dismissed. Interim order passed on 22.12.06 stands vacated. The respondent Corporation shall now proceed with the matter in accordance with law. Having regard to the facts and circumstances involved in the case, there shall be on order as to costs.